Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.

WAYNE COUNTY FRIEND OF THE COURT, BY JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court;WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX I TO PETITION FOR A WRIT OF CERTIORARI

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Counsel for the Petitioner

85 PP

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHLGAN
SOUTHERN DIVISION

MICHAEL E. TINDALL.

Plaintiff.

Case No. 98-C V-73896-DT

V.

HONORABLE DENISE PAGE HOOD

WAYNE COUNTY FRIEND OF COURT, by: JOSEPH A. SCHEWE. DIRECTOR OF LEGAL SERVICES, and ALAN E. SKROK, STAFF ATTORNEY and ASSISTANT FRIEND OF COURT; WAYNE *COUNTY* SHERIFF'S DEPARTMENT, by: ROBERT FICANO. SHERIFF~ WAYNE CO~JNTY CIRCUIT COURT. FAMILY DIVISION, by: KIRSTEN FRANK KELLY, PRESIDING JUDGE, MICHAEL F. SAPALA, CHIEF JUDGE,

Defendants.

ORDER DISMISSING COMPLAINT

Pursuant to the Remand and Judgment entered by the United States Court of Appeals for the Sixth Circuit tiled October 15, 2001,

IT IS ORDERED that the Complaint is DISMISSED in its entirety.

"S/_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: OCTOBER 23, 2001

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL E. TINDALL, Plaintiff-Appellant,

v.

WAYNE COUNTY FRIEND OF THE COURT, by: JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney; ASSISTANT FRIEND OF COURT; WAYNE COUNTY SHERIFF'S DEPARTMENT, by: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F. SAPALA, Chief Judge, Defendants-Appellees.

MICHAEL E. TINDALL, Plaintiff-Appellant/Cross-Appellee,

v.

WAYNE COUNTY FRIEND OF THE COURT, by: JOSEPH A. SCHEWE, Director of Legal Services; WAYNE COUNTY SHERIFF'S DEPARTMENT, by:

ROBERT FICANO, Sheriff; ALAN E. SKROK, Staff Attorney; ASSISTANT FRIEND OF COURT, Defendants, WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: Kirsten Frank Kelly, Presiding Judge; Michael F. Sapala, Chief Judge, Defendants-Appellees/Cross-Appellants.

MICHAEL E. TINDALL, Plaintiff-Appellant/Cross-Appellee,

v.

WAYNE COUNTY FRIEND OF THE COURT, by: Joseph A. Schewe, Director of Legal Services; Alan E. Skrok, Staff Attorney, Defendants-Appellees/Cross-Appellants, Wayne County Sheriff's Dep't, et al.,

Nos. 99-2208/99-2312/99-2319

June 13, 2001, Argued

October 15, 2001, Decided

October 15, 2001, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 98-73896. Denise Page Hood, District Judge.

Tindall v. Wayne County Friend of Court, 1999 U.S. Dist. LEXIS 15928 (E.D. Mich. 1999)

DISPOSITION:
VACATED judgment of district court and REMANDED with instructions to dismiss complaint.

COUNSEL:
ARGUED: Michael E. Tindall, TROMBLY TINDALL, Port Huron, Michigan, for Plaintiff.

Margery Moselle Mann, WAYNE COUNTY FRIEND OF THE COURT, LITIGATION SECTION, Detroit, Michigan, Joseph C. Marshall, III, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, Detroit, Michigan, for Defendants.

ON BRIEF: Michael E. Tindall, TROMBLY TINDALL, Port Huron, Michigan, for Plaintiff.

Margery Moselle Mann, Janet E. LeAnnais, WAYNE COUNTY FRIEND OF THE COURT, LITIGATION SECTION, Detroit, Michigan, Joseph C. Marshall, III, Kathleen A. Lang, Ann J. Foeller, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, Detroit, Michigan, for Defendants.

JUDGES:
Before: RYAN and COLE, Circuit Judges; MARBLEY, District Judge. *

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINIONBY:
R. GUY COLE, JR.

OPINION:

R. GUY COLE, JR., Circuit Judge. Attorney and divorce Michael E. Tindall is a noncustodial parent who has continually and inexplicably failed to comply with court orders requiring him to make support payments for his minor children. He has been the subject of at least eight enforcement proceedings to collect delinquent support payments, instituted under Michigan's Friend of Court Act, Mich. Comp. Laws Ann. § 552.501 et seq., and its Support and Visitation Enforcement Act, Mich. Comp. Laws Ann. § 552.601. Dissatisfied with the manner in which those proceedings were conducted, Tindall filed the instant action raising various federal claims. Named in Tindall's lawsuit are Defendants-Appellees the Wayne County Friend of the Court ("FOC"); the Wayne County Circuit Court, Family Division ("WCCC"); the Wayne County Sheriff's Department ("Sheriff's Department"); and individual defendants Joseph A. Schewe, Director of

FOC Legal Services; Alan E. Skrok, FOC Staff Attorney; Robert Ficano, Sheriff, Wayne County Sheriff's Department; Kirsten Frank Kelly, Presiding Judge, WCCC; and Michael F. Sapala, Chief Judge, WCCC [all collectively referred to herein as "Defendants"].

Tindall appeals from the district court's grant in part of the motions to dismiss of Defendants-Appellees, specifically challenging the district court's application of the Younger v. Harris abstention doctrine to Counts III and VI of his complaint in refusing to determine the constitutionality of Mich. Comp. Laws Ann. § 552.628 ("License Act"), which provides for the suspension of the occupational or driver's license of a delinquent child-support payer; and whether the FOC's failure to follow established policies for conducting referee and judicial hearings violated his right to due process. Tindall also assigns error to the district court's denial of his request for injunctive relief under the Federal Courts Improvement Act of 1996, as to Counts IV and V of his complaint; and to the district court's alleged misapplication of the Fed. R. Civ. P. 12(b)(6) standard in evaluating his claims.

Cross-Appellants the FOC and the WCCC raise challenges of the district court's grant in part of Tindall's motion for summary judgment and assert that: (1) the district court violated the Eleventh Amendment when it exercised subject-matter jurisdiction over Tindall's claims; (2) the post-complaint transfer of Tindall's divorce action to

Macomb County Circuit Court rendered moot his claims, thus requiring us to vacate the district court's judgment in this case; (3) the district court erroneously concluded that Tindall had standing to assert the claims raised in his complaint; (4) the district court improperly refused to abstain from ruling on all of Tindall's claims; (5) the district court erred by permitting Tindall to proceed under the Declaratory Judgment Act; and (6) the district court, in granting Tindall's summary judgment motion, erroneously concluded that Defendants' procedures for issuing show cause orders and bench warrants were unconstitutional. n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - -

n1 Defendant-Appellee Sheriff's Department has neither entered an appearance in this matter nor filed briefs for purposes of this appeal. Thus, we will assume that it has impliedly adopted the arguments raised by its co-appellees, the WCCC and the FOC.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - -

This case presents a host of legal questions for our consideration. Because, however, we conclude that the district court properly should have abstained from reaching any of Tindall's claims, we decline to reach any issue except that pertaining to abstention. We therefore VACATE the order of the district court and REMAND this case with instructions to dismiss Tindall's complaint.

I. BACKGROUND

In December 1991, a divorce judgment issued in the Wayne County Circuit Court ending the marriage of Michael and Grace Tindall, pursuant to which, Tindall was ordered to make support payments for his two minor children. He repeatedly failed to make the required payments. Between October 1993 and April 1997, no fewer than five show cause orders issued ordering Tindall to answer for his failure to pay court-ordered child support. When Tindall failed to appear at these hearings, bench warrants issued immediately thereafter. Tindall alleges that the WCCC and the FOC violated their established procedures by pre-signing these show cause orders and bench warrants and by allowing them to be issued by nonjudicial officers.

A WCCC representative issued another show cause order on April 25, 1997, ordering Tindall to appear at a hearing to answer for his failure to comply with the court's previous child support order, which had resulted in the August 21, 1996, issuance of a bench warrant. Tindall failed to appear at this hearing and instead sent his attorney to inform the court that he had never received notice of the hearing and that he had not been made aware that a bench warrant for his arrest had issued until the morning of the hearing. FOC attorney Shelly Payne disputes this point. When further confusion developed at the hearing concerning who had authorized the issuance of the

August 21, 1996, warrant and where that warrant was currently located, Payne drew up a new warrant, signed by Judge Giovan, requiring Tindall again to show cause why he should not be held in contempt. n2

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n2 At the hearing, Payne admitted that she had authorized the warrant, which Tindall points to as evidence that the FOC and its employees disregarded established procedures for issuing bench warrants. See Mich. Court Rules [hereinafter M.C.R.] 3.208(B) (noting that while a friend of court may petition for a show cause order, only a court may issue a bench warrant); see also Mich. Comp. Laws Ann. § 552.631 (same).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - -

In response to the May 14, 1997, warrant, Tindall filed a Complaint for Superintending Control in the Michigan Court of Appeals, accompanied by an "Emergency Ex Parte Motion for Superintending Control and to Stay Enforcement of a Void Bench Warrant," in which Tindall objected to the procedures that had been employed during the pendency of his divorce action. n3 Specifically, he challenged the manner in which show cause orders had been issued and how show cause hearings had been conducted and questioned the propriety of Judge Giovan's and Payne's continued participation in his divorce action. The Michigan Court of Appeals

issued a summary order denying Tindall's Complaint for Superintending Control on May 22, 1997. Tindall filed a Complaint for Superintending Control in the Michigan Supreme Court on May 27, 1997, lodging the same grievances raised in the previous complaint filed in the Court of Appeals. In a June 5, 1997, order, the Michigan Supreme Court declined review of Tindall's petition on June 5, 1997.

Tindall v. Wayne Circuit Judge, 454 Mich. 921, 564 N.W.2d 50, 1997 Mich. LEXIS 1285 (1997)

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - -

n3 Under Michigan law, superintending control orders are used to determine "if the inferior tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law." People v. Burton, 429 Mich. 133, 413 N.W.2d 413, 416 (Mich. 1987). Superintending control is an extraordinary power that may be exercised when a petitioner demonstrates both the respondent's failure to perform a clear legal duty and the absence of an adequate legal remedy. See In re Recorder's Court Bar Ass'n v. Wayne Circuit Court, 443 Mich. 110, 503 N.W.2d 885, 897 (Mich. 1993). If it is determined that a petitioner seeking such an order has an adequate legal remedy by resort to the state appellate process, a complaint for an order of superintending control must be dismissed. See

M.C.R. 3.302(D)(2). Review in such cases is limited to questions of law. See id.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - -

Tindall's continued nonpayment of child support resulted in the issuance of additional show cause orders and bench warrants. Several hearings were held at which Tindall was required to demonstrate why he should not be held in contempt for his open defiance of the court's orders. On one such occasion, a WCCC judge held Tindall in contempt of court and ordered him incarcerated for forty-five days, or until he made a $2000 payment towards his child support obligations. Tindall complied with the court's order and avoided incarceration. Thereafter, on August 24, 1998, the FOC served Tindall with a notice informing him that on September 8, 1998, it would seek an order suspending his license to practice law for his failure to pay court-ordered child support. Tindall filed no motion to quash the notice, failed to appear at the hearing, and did not otherwise raise a challenge to it in state court, but proceeded instead to federal court to file the lawsuit presently before us.

Tindall initiated the instant lawsuit in the United States District Court for the Eastern District of Michigan on September 4, 1998. Tindall's complaint set forth four claims, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, alleging that the License Act, which provides for the suspension of the driver's or occupational license of a delinquent child-support

payer, is unconstitutional, both facially and as applied by the WCCC and the FOC (Count III); that the procedures employed by the WCCC and the FOC to initiate contempt proceedings are unconstitutional (Count IV); that the procedures utilized by the WCCC and the FOC to issue bench warrants are unconstitutional (Count V); and that WCCC's referee hearings and judicial hearings [collectively referred to herein as "contempt proceedings"] are unconstitutional for their failure to comply with Michigan Court Rules (Count VI). Tindall sought an order from the district court declaring the contested statute and procedures unconstitutional; enjoining the named defendants from taking further action pursuant to the contested statute and procedures; and awarding him attorney fees and costs.

On or about September 28, 1998, Defendants filed separate motions to dismiss, and Tindall filed a cross-motion for summary judgment. After a hearing on the motions, the district court issued a judgment on September 30, 1999, and made the following findings: (1) because Tindall could not demonstrate that there had been any attempt by the WCCC or the FOC to enforce the License Act and suspend his law license, it abstained from ruling on the constitutionality of the statute (Count III); (2) because Tindall successfully demonstrated (without rebuttal by Defendants) that the FOC acted in bad faith by violating its established procedures for issuing show cause orders and bench warrants, no Younger abstention bar existed, and in the absence

of such a bar, both summary judgment on Counts IV and V and a declaratory judgment finding these practices unconstitutional were appropriate (Counts IV, V); and (3) with respect to the contempt proceedings, because Tindall failed to demonstrate that the FOC and the WCCC do not follow their established procedures for conducting contempt proceedings, and because he could not therefore demonstrate the requisite bad faith or flagrant unconstitutionality to overcome a Younger abstention bar, the district court abstained from ruling on this issue (Count VI). In short, the district court granted Tindall's motion for summary judgment on Counts IV and V and declined to rule on Counts III and VI, finding no exception to the Younger abstention doctrine.

II. DISCUSSION

The Younger abstention doctrine counsels a federal court to abstain from adjudicating a matter properly before it in deference to ongoing state criminal proceedings. See Younger v. Harris, 401 U.S. 37, 37-38, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982) (extending the doctrine to encompass civil and administrative proceedings). Three considerations have emerged for determining when abstention is appropriate: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding; n4 (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the

state proceedings to raise a constitutional challenge. Where a review of these considerations suggests that the state court should properly adjudicate the matter, a federal court should abstain and order the federal complaint dismissed. If, however, a plaintiff can demonstrate extraordinary circumstances such as bad faith, harassment, flagrant unconstitutionality, or another unusual circumstance warranting equitable relief, then a federal court may decline to abstain. See Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996). A district court's decision to abstain from adjudicating a claim pursuant to the Younger doctrine is a question of law that we review de novo. See Cooper v. Parrish, 203 F.3d 937, 954 (6th Cir. 2000).

- - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 We have relaxed this requirement, noting that "even in the absence of a pending state proceeding . . ., a federal court cannot grant relief regarding unconstitutional practices which occur at a state trial." Parker v. Thomas, 626 F.2d 1, 10 (6th Cir. 1980).

- - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In the instant case, the district court reviewed each of these factors and determined that it should properly abstain from considering Tindall's claims. It then proceeded to consider whether Tindall had satisfied any of the recognized Younger exceptions, and concluded that he had demonstrated, with

respect to Counts IV and V, bad faith on the part of FOC. Specifically, the district court found that the Defendants' failure to rebut Tindall's allegations that they failed to follow their established procedures for issuing show cause orders and bench warrants constituted an admission to the truth of those allegations. Such an admission, the district court concluded, was evidence of bad faith, thus removing any Younger bar to its consideration of those claims.

Defendants submit that the district court disregarded this Circuit's well-settled rule that "federal courts, absent 'extraordinary circumstances' must abstain from granting declaratory or injunctive relief [affecting a civil contempt hearing stemming from the nonpayment of child support] because doing so would involve unduly intrusive interference with, and monitoring of, the day-to-day conduct of state hearings and trials." Sevier v. Turner, 742 F.2d 262, 269-70 (6th Cir. 1984). We agree that the district court's failure to abstain contravened our holding in Sevier v. Turner, a case almost factually indistinguishable from the instant one.

In Sevier, plaintiff Freddie Sevier, a noncustodial parent obligated to pay child support for his minor children, sought injunctive and declaratory relief against various Tennessee juvenile judges and other family court officials. See Sevier, 742 F.2d at 264-65. Sevier alleged, inter alia, various due process violations stemming from the officials' alleged failure to inform him of certain rights to which he was

entitled at a civil contempt hearing (e.g., the right to counsel). See id. at 265-66. When he was unsuccessful in obtaining relief from the trial court, Sevier filed before the Tennessee Court of Appeals and the Tennessee Supreme Court Tennessee's equivalent of a motion for superintending control, seeking an extraordinary appeal from the trial court's adverse ruling. See id. at 266. Both appeals were denied, and Sevier then sought relief in federal court. See id. The district court dismissed his suit. See id. On appeal, relying on our decision in Parker v. Turner, 626 F.2d 1 (6th Cir. 1980), we abstained from adjudicating Sevier's injunctive- and declaratory-relief claims, finding that Sevier had failed to demonstrate "extraordinary circumstances" for federal court relief. See Sevier, 742 F.2d at 270.

The district court in this case never considered the impact of Sevier on Tindall's case, concluding that while the action might otherwise be barred, Defendants' bad faith provided a basis for reaching Counts IV and V of Tindall's complaint. We disagree with the district court's analysis and conclude that Sevier forecloses Tindall's action. Although the Supreme Court has recognized that bad-faith prosecution of an individual may serve as a proper exception to the Younger abstention doctrine, see, e.g., Middlesex County Ethics Comm., 457 U.S. at 435, we have found no Supreme Court case that has ever authorized federal intervention under this exception. Such cases thus are exceedingly rare, particularly where a plaintiff seeking to defeat an abstention argument has failed to avail himself first

of state appellate processes before seeking relief in federal court:

> The actions alleged to constitute evidence of bad faith on the part of the defendants in the instant appeal can all properly be challenged, either by motion to the trial court, or later on appeal to the state appellate courts. As such, Ballard plainly has an adequate opportunity to have [her] constitutional defenses heard and determined during the course of the state court proceedings. Where there exists the possibility of raising and correcting constitutional claims in state courts, the principles of federalism and comity expressed in Younger require that a criminal defendant must first exhaust his state appellate remedies before seeking relief in the District Court. Ballard v. Stanton, 833 F.2d 593, 594 (6th Cir. 1987) (emphasis added) (internal citations and quotation marks omitted). Here, it is undisputed that Tindall's only resort to Michigan courts for relief occurred when he filed his motions for superintending control before the Michigan Court of Appeals and the Michigan Supreme Court. Those appeals, without more, are insufficient to rebut the presumption in favor of abstention. See Sevier, 742 F.2d at 270-71.

The district court erred by folding into its inquiry of the abstention question consideration of whether Defendants had responded to the allegations set forth in Tindall's complaint. In resolving the threshold question of whether it should properly abstain from consideration of Tindall's claims, it

essentially made a merits determination -- that Defendants' failure to rebut the claims raised in Tindall's complaint constituted an "admission" entitling him to relief. We are not persuaded that a disputed admission is sufficient to demonstrate "extraordinary circumstances." Indeed, if we declined to find the requisite "extraordinary circumstances" to intervene in Sevier, where the plaintiff alleged injuries far more egregious than Tindall's, then a fortiori we are foreclosed also from reaching Tindall's claims. See 742 F.2d at 265-67 (discussing how the officials' alleged violations arguably resulted in incarceration of, financial hardship to, and job loss by Sevier).

III. CONCLUSION

For the foregoing reasons, we VACATE the judgment of the district court and REMAND this case with instructions to dismiss Tindall's complaint in its entirety.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

MICHAEL E. TINDALL, Plaintiff,

v.

WAYNE COUNTY FRIEND OF COURT, by: JOSEPH A. SCHEWE, DIRECTOR OF LEGAL SERVICES, and ALAN E. SKROK, STAFF ATTORNEY and ASSISTANT FRIEND OF COURT;

WAYNE COUNTY SHERIFF'S DEPARTMENT, by: ROBERT FICANO, SHERIFF;
WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: KIRSTEN FRANK KELLY, PRESIDING JUDGE, MICHAEL F. SAPALA, CHIEF JUDGE, Defendants.

Case No. 98-CV-73896-DT

September 30, 1999, Decided

September 30, 1999, Filed

COUNSEL:
For MICHAEL E. TINDALL, plaintiff: Michael E. Tindall, Trombly, Tindall P.L.L.C., Port Huron, MI.

For WAYNE COUNTY FRIEND OF COURT, JOSEPH A. SCHEWE, ALAN E. SKROK, defendants: Margery M. Mann, Wayne County Friend of the Court, Detroit, MI.

For WAYNE COUNTY SHERIFF DEPARTMENT, defendant: Edward Ewell, Jr., Robert S. Gazall, Herman G. Petzold, III, Wayne County Corporation Counsel, Detroit, MI.

For KIRSTEN FRANK KELLY, MICHAEL F. SAPALA, defendants: Brian D. Einhorn, John M. Cooney, Collins, Einhorn, Southfield, MI.

For DAVID FINDLING, movant: David M. Findling, Royal Oak, MI.

JUDGES:
DENISE PAGE HOOD, United States District Judge.

OPINIONBY:
DENISE PAGE HOOD

OPINION:

MEMORANDUM OPINION AND ORDER

I. FACTS

Plaintiff Michael E. Tindall filed the instant suit under 42 U.S.C. @ 1983 claiming that his constitutional rights are being violated by the Defendants' enforcement of Plaintiff's child support

obligations. Plaintiff claims the following: 1) that M.C.L.A. @ 552.628 provides for an nconstitutional suspension of an occupational license (Count III); 2) that the show cause orders issued by the Friend of the Court and Wayne County Circuit Court are illegal (Count IV); 3) that the bench warrants issued by Defendants are illegal (Count V); and 4) that the referee and judicial hearings are illegal (Count V). n1

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n1 Count I, entitled "Jurisdiction" does not state a claim but merely sets forth the jurisdictional basis of Plaintiff's Complaint. Count II, entitled "General Allegations," also does not state a specific claim but merely sets forth the factual basis of Plaintiff's claims found in Counts III through V.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - -

Plaintiff was divorced by a Judgment of Divorce entered in December 1991 by the Wayne County Circuit Court. From 1992 through the present, Plaintiff claims he has been the subject of about eight show cause orders issued by the Friend of the Court during referee and judicial hearings. Plaintiff claims he has been illegally incarcerated without proper notice, hearing, opportunity to defend or be represented by counsel. Plaintiff states that he has orally and in writing objected to the procedures before the Wayne County Circuit Court,

by complaint for Superintending Control in the Michigan Court of Appeals and by complaint for Superintending Control in the Michigan Supreme Court. These complaints were denied.

This matter is now before this Court on the various Defendants' Motion to Dismiss and Plaintiff's Motion for Summary Judgment. Responses were filed and a hearing was held on the matter.

II. ANALYSIS

A. Subject Matter Jurisdiction

1. Abstention Factors

Although not addressed by the parties, the Court must first determine whether it has subject matter jurisdiction over Plaintiff's Complaint. Plaintiff alleges Section 1983 claims in his Complaint. Inasmuch as Plaintiff is seeking federal review of a State Court order, this Court has no subject matter jurisdiction over such a claim.

A United States District Court has no authority to review final judgments of a state court judicial proceedings. Review of such judgments may be had in the United States Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). To the extent that a District Court is requested to

review a State Court's order, the District Court lacks subject-matter jurisdiction over those complaints. Lower federal courts possess no power whatever to sit in direct review of state court decisions. If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicialproceeding of a particular plaintiff's complaint, then the district court is in essence being called upon to review the state-court decision, which the district court may not do. Id. at 483. To the extent that a general challenge to the constitutionality of a certain rule is alleged, the District Court does have subject-matter jurisdiction over those complaints. Id. at 482-483. The Feldman case involved a constitutional challenge to a state's regulation of lawyers. The Supreme Court in Feldman in determining whether or not a constitutional claim is inextricably intertwined to a state court's order in a judicial proceeding, stated:

... We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. (citations omitted). Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this

regard, 28 U.S.C. @ 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this (U.S. Supreme Court) Court. 28 U.S.C. @ 1257. Feldman, 460 U.S. at 485-486. Federal courts require that a plaintiff raise his federal constitutional claims at the state level before the federal courts will review a state court's decision. The Supreme Court has noted the competence of state courts to adjudicate federal constitutional claims. Feldman, 460 U.S. at 483. Principles of equity, comity and federalism in certain circumstances counsel abstention in deference to ongoing state proceedings. Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). In Younger, the Supreme Court held that a federal court should not interfere with a pending state criminal proceeding except in the rare situation where an injunction is necessary to prevent great

and immediate injury. Id. at 44. The Supreme Court has applied abstention to state civil proceedings which involve important state interests and to a variety of state administrative proceedings. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982). The Supreme Court has enumerated a three-part test to determine abstention:

1) Whether the proceedings involved constitute an ongoing state judicial proceeding;
2) Do the proceedings implicate important state interests; and
3) Is there an adequate opportunity in the state proceedings to raise constitutional challenges?

Id. at 432.

2. Ongoing State Judicial Proceeding

In this case, the underlying proceeding involved is enforcement of Plaintiff's child support obligations under the divorce judgment entered by the Wayne County Circuit Court. If a state action is pending when the federal complaint was filed, the federal action must be dismissed. Hicks v. Miranda, 422 U.S. 332, 45 L. Ed. 2d 223, 95 S. Ct. 2281 (1975). Whether there is a pending state judicial proceeding, the Supreme Court has held that "[a] judicial inquiry investigates, declares and enforces

liabilities as they stand on present or past facts and under laws supposed already to exist." New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 370, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989). So long as state court judicial review is available, Younger abstention applies. Fieger v. Thomas, 74 F.3d 740, 745 (6th Cir. 1996).

The first requirement of the Younger abstention has been met. There is no dispute that the state proceedings in this case involve the enforcement of Defendant's child support obligations under a divorce judgment entered by the Wayne County Circuit Court. Plaintiff has not shown that he has appealed any of the orders entered by the Wayne County Circuit Court. Plaintiff did file a Complaint of Superintending Control with the Michigan Court of Appeals and with the Michigan Supreme Court. The requests for Superintending Control sought a stay of the proceedings before the Wayne County Circuit Court and to determine the fitness of Judge William Giovan to preside over the case. (Exs. E and F to Plaintiff's Complaint) Both courts denied Plaintiff's Complaint for Superintending Control. In Michigan, superintending control is an extraordinary power that may be invoked when the plaintiff demonstrates the defendant's failure to perform a clear legal duty and the absence of an adequate legal remedy. In re Recorder's Court Bar Ass'n v. Wayne Circuit Court, 443 Mich. 110, 134, 503 N.W.2d 885 (1993). Superintending control orders are used to determine "if the inferior

tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law." In re People v. Burton, 429 Mich. 133, 139, 413 N.W.2d 413 (1994). The review by the Michigan appellate courts on a superintending control complaint is limited to questions of law and is not available when the plaintiff has an adequate legal remedy through an appeal. Id. When an appeal is available, the complaint for an order of superintending control must be dismissed. M.C.R. 3.302((D)(2). Appeal procedures to the Michigan Court of Appeals are governed by M.C.R. 7.200 et seq. and to the Michigan Supreme Court by M.C.R. 7.300 et seq.

The Court finds that there is currently a pending state judicial proceeding before the Wayne County Circuit Court involving Plaintiff's child support obligations under a divorce judgment. Plaintiff has not taken advantage of the appeal process to further adjudicate his disagreements with the Circuit Court's rulings, other than applying for superintending control which is not a substitute for the appellate process.

3. Important State Interests

The second prong of the abstention analysis has also been met. The state proceedings before the Wayne County Circuit Court-child support enforcement issues and domestic relations law-involve a paramount state interest. Mann v.

Conlin, 22 F.3d 100, 105 (6th Cir. 1994); Parker v. Turner, 626 F.2d 1, 3 (6th Cir. 1980).

4. Adequate Opportunity to Raise Constitutional Issues

The third requirement for abstention-that there be an adequate opportunity in state proceedings to raise constitutional challenges-has also been met.Abstention is appropriate unless state law clearly bars the interposition of the constitutional claims. Moore v. Sims, 442 U.S. 415, 425-26, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979). The burden rests on the federal plaintiff to show that state procedural law barred presentation of the plaintiff's claims. Id. at 432.

As discussed above, Plaintiff has the opportunity to challenge the constitutionality of the procedures through the Michigan appellate courts. Plaintiff has not shown that he has challenged Defendants' procedures based on constitutional reasons before the Wayne County Circuit Court-in the form of motions--let alone before the Michigan appellate courts. Plaintiff's Complaints for Superintending Control do not address the constitutional challenges he has brought before this Court. The Michigan Courts have not had the opportunity to review Plaintiff's constitutional challenges to the procedures before the Wayne County Circuit Court nor the constitutionality of M.C.L.A. @ 552.628 which authorizes the Michigan circuit courts to

suspend an occupational license where an individual is in arrearage under a child support order exceeding three months. Plaintiff, an attorney, is capable of presenting constitutional issues before the Michigan courts, as evidenced by the documents he has submitted before this Court. There has been no showing that the rules and procedures established in Michigan bar Plaintiff from presenting his constitutional claims before the Michigan courts.

B. Exceptions to Abstention

1. Plaintiff's claims of constitutional violations

A federal court normally orders a complaint dismissed if the three requirements for Younger abstention are met unless a plaintiff can show an exception from abstention such as bad faith, harassment, or flagrant unconstitutionality. Fieger, 74 F.3d at 750. The Younger Court has stated that "the possible unconstitutionality, of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it," especially absent "any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." Younger, 401 U.S. at 54. Any challenged statute must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Id. at 53-54.

Plaintiff claims that he has shown that Defendants' actions to enforce child support orders were made in bad faith. Plaintiff states that Defendants are acting in bad faith by blindly and blatantly ignoring the constitutional principles established by the federal constitution which are recognized in Michigan. Plaintiff addresses three instances where Defendants have violated his constitutional rights.

The first instance is that the Friend of the Court personnel, with the Circuit Court's complicity- issues show cause orders which are pre-printed, pre-signed by the Circuit Court judge, without review by Mr. Joseph A. Schewe for the Friend of the Court or a Circuit Court judge. Plaintiff states that he does not specifically challenge the constitutionality of the Friend of the Court and Enforcement Acts but that because the Friend of the Court does not follow the rules and statutes, his Fourth Amendment rights to procedural due process have been violated.

The second instance in which Plaintiff claims a violation of his constitutional rights is that the Friend of the Court personnel and the Circuit Court do not follow the rules and procedures in handling contempt proceedings. Plaintiff claims that he was not given alternatives to incarceration under M.C.L.A. @@ 552.635 and 552.637 nor given notice as to the standard of proof the contemnor

must meet to rebut the statutory presumption under M.C.L.A. @ 552.633. Plaintiff claims that if the Friend of the Court attorney is not satisfied with any offers by the party in arrears, a hearing before a referee is then immediately conducted. Plaintiff states that the referee hearing is conducted on hearsay statements from the Friend of the Court attorney, no evidence or testimony is taken, no cross examination is allowed, and the rules of evidence are not applied or enforced nor findings of fact or conclusions are made, as required by M.C.R. 3.215(E). If either party objects to the referee's oral decision, the parties are ordered to immediately appear before a Wayne County Circuit Court judge. The Friend of the Court attorney then orally recites to the judge what he claims the referee decided earlier. Neither the judge nor the parties are provided a written referee recommendation. Neither the parties nor the Friend of the Court attorney is sworn to testify before the Judge. The rules of evidence are not followed by the judge nor cross-examination allowed. The alleged contemnor is not advised by the judge of his right to counsel nor the existence of statutory alternatives to incarceration. Plaintiff claims the hearing usually lasts less than ten (10) minutes and usually results in the incarceration of the alleged contemnor.

The third instance of violation of Defendant's constitutional rights is that the Circuit Court may restrict Plaintiff's ability to work under M.C.L.A. @ 552.628. This statute allows the Circuit Court to

suspend a professional license if child support obligations are not met. Plaintiff argues that M.C.L.A. @ 552.628 violates his substantive and procedural due process rights.

Plaintiff submitted documentary evidence and an affidavit to support his arguments. Defendants submitted no documentary evidence to rebut Plaintiff's factual allegations that the Friend of the Court personnel and the Circuit Court do not follow the statutory provisions or the court rules. Defendants declined to submit any evidence or testimony from the Court at the hearing.

2. Pre-printed, Pre-Signed Order to Show Causes and Bench Warrants

As noted previously, Defendants have not submitted any evidence to rebut Plaintiff's evidence that the Friend of the Court, without review by a Circuit Court judge, issues a bench warrant at will. Plaintiff has presented sufficient evidence to support his allegation that the Friend of the Court personnel, with the Circuit Court's complicity, issues show cause orders which are pre-printed, pre-signed by the Circuit Court judge.

Plaintiff submitted bench warrants issued by the Circuit Court which he claims are pre-printed and issued without review and without the actual signature of a Circuit Judge. Attached to Plaintiff's Complaint, is a transcript of a May 14, 1997 Show

Cause Hearing where the Friend of the Court attorney, Shelly A. Payne, admits to issuing a bench warrant for August 21,1996. (5/14/97 hrg., p. 4) When the Court asked Ms. Payne, "who authorized the bench warrant" Ms. Payne responded, "I did." (5/14/97 hrg. p. 9) The court then asked, "Can you do [sic] on your own?" Ms. Payne responded, "Yes, I do that all the time. There's a failure to appear the Friend of the Court has the power to issue a bench warrant for failure to appear." (5/14/97 hrg. p. 9)

M.C.L.A. @ 552.501 et seq. and M.C.R. 3.208 set forth the Friend of the Court's powers and duties. M.C.R. 3.208(B) regarding enforcement states as follows:

(B) Enforcement. The friend of the court is responsible for initiating proceedings to enforce an order or judgment for support, visitation, or custody.

(1) If a party has failed to comply with an order or judgment, the friend of the court may petition for an order to show cause why the party should not be held in contempt.

(2) The order to show cause must be served personally or by ordinary mail at the party's last known address.

(3) The hearing on the order to show cause may be held no sooner than seven days after the order is served on the party. If service is by ordinary mail, the hearing may be held no sooner than nine days after the order is mailed.

(4) If the party fails to appear in response to the order to show cause, the court may issue an order for arrest.

M.C.R. 3.208(B) (italics added). M.C.L.A. @ 552.631(1) state as follows:

(1) If any person has been ordered to pay support under a support order and fails or refuses to obey and perform the order, and if an order of income withholding is inapplicable or unsuccessful, a recipient of support or the office of the friend of the court may commence a civil contempt proceeding by filing in the circuit court a petition for an order to show cause why the delinquent payer should not be held in contempt. If the payer fails to appear in response to an order to show cause, the court may issue a bench warrant requiring that the payer be brought before the court without unnecessary delay to answer and plead that neglect or refusal. M.C.L.A. @ 552.631(1) (italics added).

Based on the unrebutted evidence submitted by Plaintiff, the Court finds that Plaintiff has submitted sufficient evidence to support his claim that it is the Wayne County Friend of the Court's

practice to issue orders to show cause and bench warrants using pre-printed forms with the judge's signature already affixed without the judge's review and approval as required by M.C.R. 3.208(B) and M.C.L.A. @ 552.631. Plaintiff's Complaint and affidavit stating that no Circuit Court judge reviews or actually signs the show cause orders and the bench warrants is unrebutted. No evidence to the contrary was submitted by Defendants, even after the Court invited Defendants to do so at the hearing. n2 Plaintiff has met the exception to abstention on the ground that Defendants have violated Plaintiff's due process rights under the Fourth Amendment, guaranteed by the Fourteenth Amendment, by failing to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631. An individual's right to liberty is at stake when contempt proceedings are initiated by the Friend of the Court. The Friend of the Court's actions, without actual approval by the Circuit Court judges, are outside the statutory mandate of M.C.L.A. @ 552.641 and M.C.R. 3.208(B).

- - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,

586, 89 L. Ed. 2d 538, 106 S. Ct. 1348(1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

- - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

3. Contempt Proceedings

Plaintiff has not submitted sufficient evidence to support his allegations that the Friend of the Court personnel and the Circuit Court do not follow the rules and procedures in handling contempt proceedings. Plaintiff has also not submitted sufficient evidence to show that Plaintiff was not given alternatives to incarceration under M.C.L.A. @@ 552.635 and 552.637 nor given notice as to the standard of proof the contemnor must meet to rebut the statutory presumption under M.C.L.A. @ 552.633. Plaintiff has failed to submit sufficient evidence to show that the rules of evidence are not followed by the referee or the Circuit Court.

M.C.L.A. @ 552.633 allows the court to find a payer in contempt "if the court finds that the payer is in arrears and if the court is satisfied that the payer has the capacity to pay out of currently available resources all or some portion of the amount due under the support order." Upon finding a payer in contempt, the court has the discretion to enter an order which includes committing the payer to the county jail. M.C.L.A. @ 552.633(1)(a)-(e). M.C.L.A. @ 552.635(1) allows the court to find a

payer with capacity to pay arrearage in contempt "if the court is satisfied that by the exercise of diligence the payer could have the capacity to pay all or some portion of the amount due under the support order and that the payer fails or refuses to do so." Upon finding a payer in contempt, the court has the discretion to enter an order, including committing the payer to the county jail. M.C.L.A. @ 552.635(2)(a)-(c). M.C.L.A. @ 552.637 sets forth the provisions of the order of commitment pursuant to M.C.L.A. @@ 552.633 and 552.635. Nothing in these three statutes require a judge to notify a payer as to the alternatives which may be found in these statutes.

Plaintiff has not submitted any evidence, other than Plaintiff's conclusory allegations, to support his allegations that the rules of evidence are not followed during the hearings before the friend of the court, the referee or the circuit court judge. Disagreements with a judge's findings under M.C.L.A. @@ 552.633, 552.635 and 552.637 and any disputed evidentiary issues before the Friend of the Court, the Referee or the Circuit Court judge may be brought before the state and appellate courts. None of these allegations are "flagrantly and patently violative of express constitutional prohibitions" as required by the Younger abstention doctrine. Younger, 401 U.S. at 53-54. The Court will abstain from ruling on these issues.

4. M.C.L.A. @ 552.628

The Court will not address the issue that M.C.L.A. @ 552.628 is unconstitutional because Plaintiff has not been subjected to the provisions of that statute. Plaintiff has not shown that there is a subject matter in controversy regarding the constitutionality of M.C.L.A. @ 552.628. As the Supreme Court stated in Younger, "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." Here, there has been no allegation that any attempts have been made to implement the statute. The Court will abstain from ruling on the constitutionality of M.C.L.A. @ 552.628 because Plaintiff has not shown any attempt to enforce the statute.

C. Anti-Injunction Statute

Defendants Michael F. Sapala and Kirsten Frank Kelly claim that 28 U.S.C. @ 2283 expressly forbids injunctive relief against judicial officers. 28 U.S.C. @ 2283 states:

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The Supreme Court in Mitchum v. Foster, 407 U.S. 225, 242, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972), found that Section 1983 is an explicit exception to the

anti-injunction statute. The Sixth Circuit expressly adopted those Supreme Court findings in Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 562 (6th Cir. 1982).

Because Plaintiff filed a suit in this Court pursuant to 42 U.S.C. @ 1983, the anti-injunction statute, 28 U.S.C. @ 2283, is inapplicable to the instant case. However, for the reasons set forth below, injunctive relief is not available to Plaintiff.

D. Absolute Immunity

Alternatively, the Wayne County Circuit Court judges and the Friend of the Court employees claim they are absolutely immune from the suit. Plaintiff agrees that judicial officers and friend of the court employees are absolutely immune from claims for monetary damages under Section 1983 while acting in their official capacities. Plaintiff does not seek damages. Plaintiff seeks a declaration that the enforcement hearings and procedures conducted by the friend of the court and its referees are unconstitutional.

It is well settled that judicial officers are absolutely immune from claims for damages under Section 1983. Imbler v. Pachtman, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976). Friend of the Court employees are also absolutely immune from claims for damages whether acting as judicial designees, including referees or as prosecutors,

such as Friend of the Court attorneys seeking enforcement of child custody and support orders. Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1972). In Pulliam v. Allen, 466 U.S. 522, 541-42, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984), the Supreme Court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in his/her judicial capacity. Equitable relief against a judge, as with any other defendant, is limited to cases where there is "a showing of an inadequate remedy at law and of a serious risk of irreparable harm. ..." Pulliam, 466 U.S. at 537.

On October 19, 1996, Public Law 104-317, the Federal Courts Improvement Act of 1996, was signed in to law. Section 309 of the Act amended 42 U.S.C. @ 1983 as follows:

> In any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. @ 1983 (italics added);Kampfer v. Scullin, 989 F. Supp. 194, 201(N.D. N.Y. 1997).

Absolute immunity bars not only a Section 1983 claim for damages but with the amended language the immunity extends to a Section 1983 claim for injunctive relief, unless a declaratory decree was violated or declaratory relief is unavailable. Montero

v. Travis, 171 F.3d 757, 761 (2nd Cir. 1999); Hili v. Sciarrotta, 140 F.3d 210, 215 (2nd Cir. 1998); Ackermann v. Doyle, 43 F. Supp. 2d 265, 272 (E.D. N.Y. 1999).

The legislative history of P.L. 104-317 clearly indicates that Congress intended to protect judicial officers from Section 1983 claims for injunctive relief, as well as damages. The Senate Report on the bill states:

This section restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984) .

In Pulliam, the Supreme Court broke with 400 years of common-law tradition and weakened judicial immunity protections. The case concerned a State magistrate who jailed an individual for failing to post bond for an offense which could be punished only by a fine and not incarceration. The defendant filed an action under 42 U.S.C. 1983, obtaining both an injunction against the magistrate's practice of requiring bonds for nonincarcerable offenses, and an award of costs, including attorney's fees. The Supreme Court affirmed, expressly holding that judicial immunity is not a bar to injunctive relief in section 1983 actions against a State judge acting in a judicial capacity, or to the award of attorney's fees under the Civil Rights Attorney Fees Award Act, 42 U.S.C.

1988. Those statutes are now amended to preclude awards of costs and attorney's fees against judges for acts taken in their judicial capacity, and to bar injunctive relief unless declaratory relief is inadequate.

Subsection 311(c)[Senate version of Section 309] amends 42 U.S.C. 1983 to bar a Federal judge from granting injunctive relief against a State judge, unless declaratory relief is unavailable or the State judge violated a declaratory decree. ...

This section does not provide absolute immunity for judicial officers. Immunity is not granted for any conduct "clearly in excess" of a judge's jurisdiction, even if the act is taken in a judicial capacity. Moreover, litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable. Section 311 restores the full scope of judicial immunity lost in Pulliam and will go far in eliminating frivolous and harassing lawsuits which threaten the independence and objective decision-making essential to the judicial process. P.L. 104-317, Senate Report No. 104-366, Sept. 9, 1996.

It is clear that Congress amended Section 1983 to limit suits against judicial officers absent a showing that the judicial officer violated a declaratory decree or there is no declaratory decree available. In this case, there is no allegation that the judicial officers have violated a declaratory decree. Plaintiff sought

declaratory relief, in addition to injunctive relief, which is available pursuant to 28 U.S.C. @ 2201. Since there is no allegation that the judicial officers in this case have violated a declaratory decree, absolute judicial immunity bars Plaintiff's request for injunctive relief pursuant to 42 U.S.C. @ 1983. Based on the amendment to 42 U.S.C. @ 1983, it appears that the anti-injunction statute, 28 U.S.C. @ 2283 now applies to 42 U.S.C. @ 1983 claims with the limitations set forth in Section 1983. Plaintiff's claim for injunctive relief is denied.

E. Declaratory Relief

1. Five Factors

As noted previously, in addition to injunctive relief, Plaintiff has sought declaratory relief. 28 U.S.C. @ 2201 provides in pertinent part:

In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declarations, where or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The Declaratory Judgment Act "is an enabling Act, which confers discretion on the courts rather than

an absolute right upon the litigant." Allstate Ins. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990). In the Sixth Circuit, five factors are generally considered and weighed before declaratory relief may be granted:

1) whether the declaratory action would settle the controversy; 2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; 3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; 4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and 5) whether there is an alternative remedy which is better or more effective. Id.

2. First Factor / Settle the Controversy

The only claim remaining in this case is whether Defendants violated Plaintiff's due process constitutional rights when the Friend of the Court personnel, without the Circuit Court's review, issued show cause orders which are pre-printed and pre-signed by the Circuit Court judge but are not reviewed pursuant to M.C.R. 3.208(B) and M.C.L.A. @ 552.631. Plaintiff claims a liberty interest created by the state court rules and statutes under the due process clause. Plaintiff does not claim that M.C.R. 3.208(B) and M.C.L.A. @

552.631 are unconstitutional but that Defendants failed to follow the procedures outlined under the rule and statute.

A liberty interest due process claim was considered by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). The Supreme Court noted:

[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. ... The most elemental of due process rights [is] freedom from a wholly arbitrary deprivation of liberty.

Id. at 319. A violation of a state's formal procedure does not in and of itself implicate constitutional due process concerns. Levine v. Torvik, 986 F.2d 1506, 1515 (6th Cir. 1993). "A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." Id. The proper inquiry is "whether the state's procedures have passed federal constitutional muster, not whether there was an error in the state's applying its own law." Id. To establish a due process claim violation under the constitution, it must be shown that "the state court's application of its constitutionally adequate standard was so

erroneous as to raise an independent due process violation." Id.

Based on the unrebutted evidence submitted by Plaintiff, he has established that Defendants' application of the state procedural rules violated his due process right. When show cause orders and bench warrants for a person's arrest are issued against a person, that person is facing a loss of liberty which the state cannot impose without notice and a meaningful opportunity to defend. The rules set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 were enacted to protect a person's right to proper notice and to have independent review of the show cause order and bench warrant, other than that of Friend of the Court personnel who prosecute arrearage claims. The issuance of show cause orders and bench warrants on pre-printed form with the judge's signature already affixed to the form at the discretion of Friend of the Court personnel and without subsequent review by a judge violates Plaintiff's due process rights under the Fourth Amendment, guaranteed by the Fourteenth Amendment.

The Court's declaration that Defendants' failure to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 violated Plaintiff's due process rights settles the controversy between Plaintiff and the Defendants as to whether Plaintiff's due process rights have been violated.

3. Balancing of the Remaining Factors

The Court's declaration clarifies the legal relations in issue. The Court's declaration establishes Defendants' duties toward Plaintiff and shows that Defendants should meaningfully follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 before issuing show cause orders or bench warrants.

There may be some showing that Plaintiff is using this action for the purpose of "procedural fencing" in that Plaintiff may wish to avoid child support payments as ordered by the state court. The Court has made it clear that the Court will not disturb any findings by the Circuit Court on the issue of child support payments. The sole issue before this Court is the due process constitutional violation noted above.

The Court does not find that declaratory relief would increase friction between our federal and state courts and improperly encroach upon state jurisdiction. This Court's sole focus is whether Defendants have violated Plaintiff's due process rights by failing to meaningfully follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631. The Court makes no finding as to the appropriateness of the child support order issued and any prosecution to collect under the order so long as Plaintiff's due process rights are protected.

No other alternative has been presented by Defendants as to how to correct the violation of Plaintiff's due process rights. The only apparent way to correct the due process violation is to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631. The Court's finding that Defendants have failed to follow these procedures should put Defendants on notice that the procedures they have been following violate Plaintiff's due process rights. The Circuit Court was made aware that Friend of the Court personnel issued the show cause orders and bench warrants without review by a judge. Defendants did not produce any evidence to rebut Plaintiff's evidence.

Weighing the factors involved, the Court finds that a declaratory judgment should be issued in this action. The Court declares that the Friend of the Court's practice to issue show cause orders and bench warrants without actual review by a judge and Defendants' failure to follow the procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 violate Plaintiff's due process rights.

III. CONCLUSION

For the reasons set forth above, the Court declares that the Friend of the Court's practice to issue show cause orders and bench warrants without actual review by a judge and Defendants' failure to follow the procedures set forth in

M.C.R. 3.208(B) and M.C.L.A. @ 552.631 violate Plaintiff's due process rights. As to the remaining claims, the Court abstains from considering those issues.

Accordingly,

IT IS ORDERED that Defendant Sapala's Motion to Dismiss (Docket No. 12, filed September 25, 1998) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that Defendant Kelly's Motion to Dismiss (Docket No. 13, filed September 28, 1998) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (Docket No. 15, filed September 28, 1998) is GRANTED IN PART and DENIED IN PART as more fully set forth above.

IT IS FURTHER ORDERED that Plaintiff's Motion to Supplement Complaint (Docket No. 27, filed March 24, 1999) is MOOT.

IT IS FURTHER ORDERED that Defendant Wayne County Friend of the Court's Motion to Quash Plaintiff's Subpoena (Docket No. 32, filed April 2, 1999) is MOOT.

IT IS FURTHER ORDERED that Defendants Sapala and Kelly's Motion to Quash Findling Subpoena and for Protective Order (Docket Nos. 36-1 and 36-2, filed April 5, 1999) is MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel Production of Documents and Deposition of Subpoenaed Witness (Docket No. 37, filed April 6, 1999) is MOOT.

IT IS FURTHER ORDERED that Declaratory Judgment is entered in favor of Plaintiff as to the due process claim on Defendants' application of the rules and procedures set forth in M.C.R. 3.208(B) and M.C.L.A. @ 552.631 only as more fully set forth above.

IT IS FURTHER ORDERED that the Court ABSTAINS as to the Plaintiff's remaining claims and those claims are DISMISSED.

IT IS FURTHER ORDERED that Plaintiff's request for injunctive relief is DENIED.

DENISE PAGE HOOD
United States District Judge
DATED: SEP 30 1999

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL E. TINDALL,
Plaintiff

V. Case No. 98-CV-73896-DT

HONORABLE DENISE PAGE HOOD

WAYNE COUNTY FRIEND OF COURT, By: JOSEPH A. SCHEWE, DIRECTOR OF LEGAL SERVICE, and ALAN E. SKROK, STAFF ATTORNEY and ASSISTANT FRIEND OF COURT; WAYNE COUNTY SHERIFF'S DEPARTMENT, by: ROBERT FICANO, SHERIFF; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, by: KIRSTEN FRANK KELLY, PRESIDING JUDGE, MICHAEL F. SAPALA, CHIEF JUDGE,

Defendants.
_____/

MEMORANDUM
OPINION AND

ORDER

I. BACKGROUND

On September *30,* 1999, the Court entered a Memorandum Opinion and Order and Judgement in this case. The Court abstained from all of Plaintiff's claims, except for Count V, as to the due process claim only. The Court entered Judgment against Defendants Wayne County Circuit Court. Judges and Friend of the Court personnel ("Defendants") on Count V.

The Court denied Defendants' Motion for Enlargement of Time as untimely. Defendants thereafter filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b). Plaintiff at first objected to the Rule 60(b) motion stating that the Court was without jurisdiction to address the motion but Plaintiff later withdrew his objection. As noted in this Court's order denying Defendants' Motion for Enlargement of Time, the Sixth Circuit has determined that motions under Rule 60(b) must be filed within a reasonable time after judgment has been entered. Generally. the Sixth Circuit disfavors Rule 60(b) motions filed after an appeal period has run. The interests of finality of judgments and judicial economy outweigh the value of giving a party a second bite at the apple by allowing a rule 60(b) motion after an appeal period has run. *Pierce v. United Mine Workers of America Welfare,* 770 F.2d 449, 451-452(6th Cir. 1985).

Here, Defendants filed their Motion under Rule 60(b) in conjunction with their Notice of Appeal on November 1, 1999. The Court will consider Defendants' Motion for Relief from Judgment since it was filed before the appeal period had run. It should be noted that Defendants object to Plaintiffs response to their Motion for Relief from Judgment as untimely filed. Plaintiff filed an "objection" to Defendants' Motion for Relief from Judgment, on November 3, 1999. which was within the response time for filing responses under Local Rule 7.1. Plaintiffs response was filed on November 29, 1999, at which time he withdrew his previously filed "objections." Even though Plaintiff is an attorney, he is proceeding pro se and the Court will consider Plaintiffs response filed as a substitute for his "objections." Defendants have not shown they will be prejudiced by the Court's consideration of the response, especially since Defendants now want the Court to consider an affidavit filed long past the time summary judgment motions were heard.

II. DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

A. Fed. R. Civ. P. 60(b)

Fed. R. Civ. P. 60(b) in pertinent part states:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court

> may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence. surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule *59(b);* (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party *(4~* the judgment is void: (5' the judgment has been satisfied. released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Defendants have stated three arguments in support of their Motion for Relief from Judgment. First, Defendants claim that the Judgment against Defendants is void because the Court lacks subject matter jurisdiction over the Complaint. Although not

expressly identified by Defendants, the Court assumes that Defendants are seeking relief under Fed. R. Civ. P. 60(b)(4). Second, Defendants claim that the Judgment was based on a mistake in the application of the law. The Court assumes that Defendants are seeking relief under Fed. R. Civ. P. 60(b)(1) since Defendants again did not expressly identify the specific rule. Third, Defendants claim the Judgment was based on a mistake of fact by the Court. Again, the Court assumes Defendants are seeking relief under Fed. R. Civ. P. 6O(b)(1).

B. Fed. R. Civ. P. 60(b)(4)/Judgment is Void

Relief from judgment can be had under Fed. R. Civ. P. 60(b)(4) if the Judgment entered is void. Defendants claim that the Judgment is void because there is no case and controversy at issue.

It is noted that Defendants did not raise this issue in any of their papers prior to the instant motion. Even if neither party addresses the jurisdictional issue, the federal courts are under an independent obligation to examine their own jurisdiction. *Jenkins* v. *McKeithen, 395* U.S. 411. 421 (1969). The Court has a threshold duty in every case to determine whether it has subject matter jurisdiction over the controversy before it. whether or not the parties have preserved for appeal a challenge to the Court's jurisdiction. *In re Wolverine Radio Co.,* 930 F.2d 1132, 1137-38(6th Cir. 1991). The Court will address this issue at this time.

Article Ill. section 2 of the United States Constitution confines federal court jurisdiction to cases and controversies. *Arizonans for Official English v. Arizona,* 520 U.S. *43,* 117 S.Ct. 1 *055.* 1067, 137 L.Ed.2d 170 (1997). Merely because a party asks a federal court to declare his/her legal rights, the case-or-controversy requirements of Article 111 are not satisfied. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471 (1982). Federal courts are prohibited from issuing advisory opinions. *SEC v. Med. Comm. for Human Rights,* 404 U.S. 403, 407 (1972). Federal courts require that a party has standing to institute an action. *Valley Forge,* 454 U.S. at 471.

Standing involves two levels of inquiry. The first is whether the plaintiff has shown, at a minimum, some actual or threatened injury resulting from the alleged illegal action. *Id.* at 472. The second is whether the plaintiff is the proper proponent of the rights in which the action is based. *Singleton v. Wulff* 428 U.S. 106, 112-113 (1976).

Under the "injury" requirement, a plaintiff must show more than abstract injury. A plaintiff must show that he/she "has sustained or is immediately in danger of sustaining some direct injury" as a result of the challenged statute or official conduct. *Valley Forge, 454* U.S. at 476-7S. The injury or threat of injury must be both "real and immediate, "not" conjectural" or "hypothetical." O*'Shea v. Littlelon.* 414 U.S. 488, 494 (1974). Past exposure to illegal conduct, without a showing of continuing and

present adverse affects, does not meet the injury requirement. *Id.* at 495-496.

In Parker v. Turner. 626 F.2d 1 (6th Cir. 1980). a child support case, the plaintiffs were found to have standing because they claimed that they could not afford to make support payments and would likely face future contempt proceedings. Plaintiffs claimed that the procedures in enforcing their child support obligations were unconstitutional. Defendants claim that Plaintiff cannot show that he cannot make future payments because he is a lawyer, thus, Plaintiff is not facing future contempt proceedings.

There is no dispute that Plaintiff has been the subject of previous contempt proceedings. In this case, Plaintiff asserted in his Complaint and continues to assert that the Friend of the Court has erroneously and continuously overstated his child support obligations. Based on the alleged erroneous entries, Plaintiff claims he would face future contempt proceedings because he does not agree with the Friend of the Court's assessments of his child support obligations. Given Plaintiffs allegation that he does not agree with the Friend of the Court's assessments and that he would be facing future contempt proceedings, Plaintiff has established the minimum requirement of standing in this case.

Defendants cite *Johnson v. Turner,* 125 F.3d 324 (6th Cir. 1997) to support their argument. The *Johnson* case involved consolidated cases which challenged the procedures in a paternity action and

enforcement of child support obligations. The Sixth Circuit found that in paternity actions, because such actions involve a one-time judgment of paternity, the plaintiffs could not demonstrate injury because they could not show that they would be subject to future paternity actions. The Sixth Circuit found that in the absence of evidence that the plaintiffs will again be subject to paternity proceedings. the plaintiffs had no interest in the challenged statutes and proceedings. The Sixth Circuit found no standing in that case. As to the plaintiffs involved in child support payments. because the plaintiffs had not demonstrated that they could not make future support payments, the Sixth Circuit found that plaintiffs did not have the necessary standing to seek injunctive and declaratory relief. *Johnson,* 125 F.3d at 338-339.

Here. Plaintiff's child support obligation is not a one-time issue but a continuing issue. Plaintiff has alleged that the Friend of the Court's assessments are erroneous, thus, he would be subject to future contempt proceedings. Plaintiff has standing in the case before the Court. Plaintiff has satisfied the case-in-controversy requirement under Article III of the Constitution.

C. Fed. R. Civ. P. 60(b)(1)/Mistake as to Application of Law

The Sixth Circuit has stated that "mistake" as used in Rule 60(b)(1) encompasses any type of mistake or error on the part of the court. *Barrier v. Beaver,* 712 F.2d 231, 234 (6th Cir. 1983). A district

court abuses its discretion when it relies on clearly erroneous findings of fact. or when it improperly applies the law, or uses an erroneous legal standard. *Rornstadt v. Allstate Ins. Co.,* 59 F.3d 608, 615 (6th Cir. *1995).*

Defendants claim that the Court misinterpreted the "bad *faith"* exception to the abstention doctrine as enunciated in *Younger* v. *Harris,* 401 U.S. 37 (1971). Defendants argue that the state courts can adequately address the alleged bad faith actions in the state appellate courts. Defendants cite *Parker,* to support their argument. In *Parker,* the Sixth Circuit affirmed the district court's decision to abstain from the case holding that the plaintiffs, indigent fathers, could not seek federal court relief for their claims that the state courts denied them due process of law by denying them the right to counsel. the right to confront and cross-examine witnesses, and the right to testify and present witnesses on their own behalf. *Parker,* 626 F.2d at 2. The Sixth Circuit found that for the federal courts to adjudicate the suit would result in "significant and unacceptable interference in the state judicial process," which might include ongoing supervision of the state court. *Id.* at 3.

In response. Plaintiff argues that if the state court is to determine the bad faith exception under the *Younger* abstention doctrine, there would be no bad faith exception. Plaintiff claims that the bad faith issue is an issue for the federal courts, and not the state courts. A party must exhaust his state court appellate remedies unless he/she can bring himself

within the exceptions specified in *Younger. Hoffman v. Peruse,* 420 U.S. *592,* 608 *(1975).*

The Court's September 30, 1999 Memorandum Opinion and Order thoroughly went through the *Younger* abstention requirements and its applicability to Plaintiffs claims. (9/30/99 Opinion, pp. 2-14) The Court found that based on the evidence submitted by Plaintiff which was unrebutted by Defendants, Plaintiff had shown that Defendants acted in bad faith in enforcing child support orders when pre-printed, pre-signed orders to show cause and bench warrants were issued without review by a Circuit Court judge. The Court noted that when the Friend of the Court initiates contempt proceedings, an individual's right to liberty is at stake. The Friend of the Court (with the complicity of the Wayne County Circuit Court) by issuing orders to show cause and bench warrants without independent judicial review and outside the statutory mandate of M.C.L.A § *552.64* 1 and M.C.R. 3.208(B), violated Plaintiffs due process rights. In its opinion, the Court did not enjoin Defendants from any acts but merely declared that Plaintiffs rights were violated. The Court did not order Defendants to do anything. The Court's opinion did not "interfere" with any state court judicial process. The Court did not misinterpret the "bad faith" exception analysis in its Opinion.

D. Fed. R. Civ. P. 60(b)(1): Mistake as to Findings of Facts

Defendants claim the Court misunderstood the

state of the facts. Defendants argued that they did submit evidence in opposition to Plaintiffs claim. Defendants believed that the parties had stipulated to the facts as set forth in the "defendants' brief." Defendants claim that at the very least, the evidence submitted by the Defendants created an issue of fact that precluded summary judgment by this Court. Defendants argue that their counsel misunderstood the clarity of the record at a point in the proceedings when an answer had not yet been filed and no discovery had been conducted. Defendants now submit the affidavit of Kirsten Frank Kelly, Presiding Judge, Wayne County Circuit Court, Family Division, to support their position. Defendants further claim that the confusion in this case resulted from the loose usage of the term "Friend of the Court" throughout the record. Defendants argue that the family division referees, frequently referred to as the Friend of the Court Referees, are not part of the Friend of the Court, but are judges. Defendants claim that only after Referees have recommended bench warrants can the "digitized" signature of Judge Kelly be used. Defendants claim that the court, through procedures and guidelines, does monitor and supervise the issuance of orders to show cause and bench warrants. Defendants argue that the Circuit Court judges have the authority to delegate to their judicial referees the task of executing show cause orders and bench warrants.

In response, Plaintiff claims that the Court had asked Defendants on the record whether they

would wish to make any further written response to Plaintiffs motion for summary judgment. Defendants' counsel declined to do so. Defendants were aware of the posture of the proceedings. Plaintiff had initially requested a preliminary injunction, joined with a trial on the merits. Plaintiff agreed not to go forward with the preliminary injunction motion and trial on the merits but to proceed on his cross-motion for summary judgment. (10/5/98 hrg., pp. 4-6) Defendants did not submit any evidence rebutting Plaintiffs evidence regarding the orders to show causes and bench warrants. Plaintiff argues that Judge Kelly's proffered affidavit supports his claim that no independent judicial review is made before orders to show cause and bench warrants are issued.

Defendants' arguments that the parties had stipulated to the "facts" in Defendants' brief is not supported by the record. The Court expressly noted what would be addressed at the hearing. The Court expressly asked Defendants, "And that no one of the Defendants wishes to make any further written response to the Plaintiffs motion - Plaintiff's cross motion for summary judgment; is that right?" Defense counsel responded, "That is correct, Your Honor.' (10/5/98 hrg., p. 4) When Plaintiff argued, he expressly noted the standard for a motion for summary judgment. (105/98 hrg., pp. 11-12) Plaintiff expressly argued that the Complaint had extensive exhibits and was supplemented with a motion for summary judgment containing even more extensive affidavits, noting that most of the exhibits were

Defendants' own records. (10/5/98 hrg., p. 13) Plaintiff noted that Defendants had filed a response to the cross motion for summary judgment with no counter affidavits or exhibits attached. (10/5/98 hrg., p. 13)

Based on the record, the Court had no misunderstanding of the procedural posture of the case. The Court also expressly noted on the record, and the parties agreed, as to where the parties were at that stage of the proceedings. Defendants did not seek further discovery. Defendants were on notice that Plaintiff originally sought to have a preliminary injunction hearing, along with a trial on the merits. The record is clear that Defendants were aware that Plaintiff's cross motion for summary judgment was before the Court.

The Court had no misunderstanding as to who and what the differences are between the Friend of the Court, the Referee, and the Wayne County Circuit Court Judges. The Court found in its opinion that Plaintiff's due process rights were violated because there was no independent judicial review of the show cause orders or bench warrants. The Court's opinion expressly set forth the requirements under M.C.R. 3.208(B) and M.C.L.A. § 552.63 1(1) which the Court found were not followed by the Friend of the Court and the Wayne County Circuit Court. Defendants' arguments that the Circuit Court has the "authority" to "delegate administrative duties to a trial court administrator or others" does not change this Court's

opinion that an independent judicial review, by a Circuit Judge, is required by the Michigan statute and rule and constitutional requirements before the issuance of show cause orders and bench warrants since an individual's liberty is at stake.

As to whether the Court should consider Judge Kelly's affidavit, the Court declines to do so. It is within the discretion of the district court whether to consider untimely affidavits. *Hooks* v. *Hooks,* 771 F.2d 935. 946 (6th Cir. 1985). If the affidavit is untimely and the party does not alert the Court to any previously unconsidered issues of material fact, the affidavit should not be considered. *Michigan State Podiatry Ass 'n v. Blue Cross and Blue Shield of Michigan,* 681 F.Supp. 1239, 1241 (E.D. Mich. 1987). Fed. R. Civ. P. *56(c)* imposes a burden on the nonmoving party to produce evidence to rebut a properly supported motion for summary judgment. The nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond. summary judgment, if appropriate, shall be entered against him." *Celotex Corp. v. Cattrett,* 477 U.S. 317 (1986).

Defendants have not provided any viable reason as to why no evidence was submitted to rebut Plaintiffs motion for summary judgment. Even if the Court were to consider Judge Kelly's affidavit, a review of the affidavit shows that it raises no genuine

issue of material fact. The affidavit supports Plaintiff's claims that no Circuit judge independently reviews the orders to show cause and bench warrants prior to their issuance. Judge Kelly's affidavit indicates that only after Joseph Schewe, Director of Legal Services of FOC, an attorney and Assistant FOC, reviews the petitions is the digitized signature placed on the forms. (Kelly Aff., ¶~ 6.e., 6.m.) Mr. Schewe is not a referee nor a judicial officer. Judge Kelly's statement that effective October 18, 1999 a new procedure is in place only shows that she reviews "listings." Whether this new procedure complies with the applicable statutes and whether it violates Plaintiff's constitutional rights are not issues before the Court. The Court's Opinion noted that injunctive relief could be available to a party if a judicial officer has violated a declaratory decree. (9/29/99 Opinion, p. 16).

III. PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Plaintiff moves for relief from judgment under Fed.R.Civ.P. 60(b)(2) claiming that Judge Kelly's affidavit presents new evidence regarding Plaintiffs claim that the hearings before the Friend of the Court and Wayne County Circuit Courts were illegal. The Court had found that Plaintiff had not submitted sufficient evidence to support the allegations of his complaint that the hearings were illegal. Plaintiff seeks an amendment of the Declaratory Judgment as to Count VI of Plaintiff's Complaint.

Because the Court will not consider Judge Kelly's

affidavit, any new evidence in that affidavit is not before the Court. As noted above, Judge Kelly's affidavit does not change the facts which were before the Court. Plaintiff has not presented sufficient evidence regarding his claim under Count VI.

IV.PLAINTIFF'S MOTION FOR RELIEF SUPPLEMENTARY TO JUDGMENT

Plaintiff seeks to have the Court disqualify the Wayne County Circuit Court and the Friend of the Court from conducting any proceedings against or involving Plaintiff, to dissolve the *sua sponte* receivership created by the Wayne County Circuit Court, to correct the Wayne County Circuit Court and the Friend of the Court's support account, and to transfer the action to the St. Clair County Circuit Court pursuant to M.C.R. 3.21 2(B)(2)(C). Several hearings have been held before the Wayne County Circuit Court where the Court has refused to transfer the case and make any changes to Plaintiff's child support obligations. Plaintiff has also filed a bankruptcy action, which Plaintiff claims he may dismiss.

In response, Defendants claim that no actions by the Wayne County Circuit Court have been in violation of this Court's declaratory judgment. Defendants further claim that the administration of the Circuit Court's cases are not before this Court. The proper remedy for addressing any procedural issues is through the state court appellate system.

New claims brought by Plaintiff will not be addressed by the Court, including subsequent actions by the Wayne County Circuit Court. As noted by the Court in its opinion, a party may have a new cause of action for injunctive relief if he/she can show that the judicial officers have violated a federal court's declaratory judgment. Plaintiff has not presented any authority by which this Court could grant post-judgment injunctive relief. Also, the Court's judgment was declaratory and did not enjoin Defendants from any acts. The Court's Memorandum Opinion and Order and Judgment did not retain jurisdiction over enforcement of its Order. There is nothing for this Court to enforce at this time. As the Plaintiff has argued, the Court is without jurisdiction over the case, apart from the Rule 60(b) motion, since notices of appeal have been filed. The filing of a Notice of Appeal divests the district court of jurisdiction over the action and the appellate court assumes jurisdiction. *Pittock v. Otis Elevator Co.,* 8 F.3d 325 (6th Cir. 1993) Additionally, for the reasons set forth in this Court's September 30, 1999 opinion, the Court is abstaining and has abstained from any issues between the parties, other than the due process issue, on which the court has entered a judgment in favor of Plaintiff. The only matter before the Court is the Rule 60(b) motion. The Court is without jurisdiction as to any other matters because jurisdiction has been transferred to the Court of Appeals based on both parties' notices of appeal.

V. DEFENDANTS' MOTION TO STRIKE

Defendants seek an Order striking: Plaintiffs Answer to Defendants' December 23, 1999 Motion for Sanctions; Plaintiff's Request for Evidentiary Hearing; and Plaintiff's Fed. R. Civ. P. 11(c)(1)(A) Request for Award of Reasonable Expenses and Attorney Fees Incurred to Respond to and Oppose Dependants' Motion for Sanctions. After reviewing the documents, including a Motion to Disqualify, Request for Supplementary Judgment and Motion for Relief from Judgment, Defendants determined that these documents were frivolous and filed in bad faith. In accordance with Rule 11(c)(1)(A), the "safe harbor" provision, Defendants served Plaintiff with a copy of their Motion for Sanctions. Rule 11(c) states that the motion shall not be filed if not submitted to the opposing party. In direct violation of Rule 11, Plaintiff submitted a copy of Defendants' Motion for Sanctions and request for an evidentiary hearing, before Defendants filed the motion. Plaintiff then filed a response to Defendants' unfiled Motion for Sanctions. As there was no motion filed, Plaintiff should not have filed a response.

Plaintiff has not filed a response to Defendants' motion to strike. As noted above, the Court has no jurisdiction over this matter based on the notices of appeal filed by the parties. The Court cannot consider documents not related to the Rule 60(b) motions.

VI. DEFENDANTS' SUGGESTION OF MOOTNESS

AND MOTION TO VACATE THE SEPTEMBER 30, 1999 JUDGMENT AND TO DISMISS PLAINTIFF'S CLAIMS WITH PREJUDICE

Defendants claim that Plaintiffs claims are moot because he is no longer subject to the alleged procedures that he claims violate his rights to due process since the divorce action has been transferred to Macomb County Circuit Court. Defendants further claim that when a case becomes moot then the Judgment entered must be set aside. As this Court noted above, the Court no longer has jurisdiction over the Judgment, other than to rule on the Rule 60(b) motions. The Sixth Circuit's March 22, 2000 Order suggests that the Court review the mootness question based on Defendants' Motion to Vacate.

> The doctrine of mootness requires that litigation have continuing vitality, even throughout the course of appellate review. *Kremens v. Bartley,* 431 U.S. 119 (1977). Although an actual controversy once existed, changed circumstances may intervene to destroy standing to the extent that the dispute is essentially ended and meaningful relief is no longer possible. *Allen v. Mansour,* 928 F.2d 404 (Table), 1991 WL 37832 ** 1 (6th Cir. Mach 19, 1991)(unpublished). Mootness applies where a plaintiff seeks a declaratory judgment invalidating or modifying a state policy and death prevents a plaintiff from benefiting in any way from the requested relief. *Id.* An exception to the mootness doctrine is whether the issue raised by the appeal is "capable of repetition, yet

evading review." *Id.* at **2; *See Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S 498 (191 1); *Roe v. Wade,* 410 U.S. 113, 166 (1973). The party seeking to evade mootness must show that: 1) the challenged official action is likely to be repeated; 2) it will be of a duration too short to be fully litigated prior to its cessation or expiration; and 3) there is "a reasonable expectation that the same complaining party [will] be subjected to the same action again. *Weinstein v. Bradford,* 423 US 147,159 (1975).

On of the challenged official actions is whether show cause orders and bench warrants are reviewed independently by a judicial officer. Based on the record below, it appears that the challenged official actions may likely be repeated. According to Judge Kelly's affidavit1 the procedure prior to October 18, 1999 was that only after Joseph Schewe, Director of Legal Services of FOC, an attorney and Assistant FOC, reviewed the petitions was her digitized signature placed on the forms. (Kelly Aff. @@6.e, 6m). Mr. Schewe is not a referee nor a judicial officer. Judge Kelly's statement that effective October 18, 1999 a new procedure is in place only shows that she reviews "listings", the constitutionality of which is not before this Court.

As to the second requirement for mootness, based on the record before the Court, there has been a showing that based on Judge Kelley's

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1 The Court considers Judge Kelly's affidavit on the mootness issue.

affidavit and the change in procedure, the duration of the challenged action regarding the judicial review of show cause orders and bench warrants may have ceased prior to the matter being fully litigated. However, there are other actions challenged by Plaintiff which may endure too briefly to be fully litigated prior to its cessation or expiration. Plaintiff has suggested that the order transferring his divorce action to Macomb County Circuit Court was issued to support Defendants' mootness argument and to evade review. This argument may have had some merit if the order transferring the divorce action was entered sua sponte but the order was entered after Judge Callahan granted Plaintiff's motion to disqualify the Wayne County Circuit Court bench. (Ex. B to Plaintiff's Response, 12/10/99 Tr. Pp 14-15).

Regarding the third argument to establish mootness, Plaintiff is unable to show that as the complaining party he will be subjected to the same action again by the Defendants in this case. Plaintiff's divorce proceeding is no longer before the Wayne County Circuit Court.

There is no dispute that Plaintiff moved to disqualify the entire Wayne County Circuit Court bench to review his divorce action and that an order was entered transferring the case to the Macomb County Circuit Court. Plaintiff claims that the order entered transferring the case to the Macomb County Circuit Court was used to support Defendants' argument as to mootness.

Plaintiff claims that the procedures set forth by the State Court Administrator's Office were not followed. Plaintiff argues that the SCAO should have chosen the transferee County yet in the order transferring Plaintiff's divorce action, Judge J. William Callahan himself ordered the transfer to the Macomb County Circuit Court. For the reasons set forth previously, the Court will not review whether the order transferring the divorce action was entered properly since that claim is not before the Court.

Plaintiff further argues that he would face the same issues before the Macomb County Circuit Court. If Plaintiff were to be subjected to the same issues as he did in the instant case, those claims would be against different defendants than those named in the instant case. There is nothing before the Court to show that the Macomb County Circuit Court uses the same procedures for reviewing orders to show cause and bench warrants.

The Court finds that there is no longer a present, live controversy between the parties because the issues have been rendered moot by the transfer of Plaintiff's divorce action to the Macomb County Circuit Court. The Sixth Circuit will not be able to render a decision which would have an impact upon Plaintiff and the circumstances of the pending appeal do not fall within any well recognized exception to the mootness doctrine. The Court certifies to the

Sixth Circuit Court of Appeals that this Court is of the opinion that an order vacating the Judgment and dismissal should issue and requests a remand of the matter if the Court of Appeals so deems appropriate.

VII CONCLUSION

For the reasons set forth above.

IT IS ORDERED that Defendants' Motion for Relief from Judgment (Docket No.49, filed November 1, 1999) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Relief from Judgment (Docket No. 74, filed November 29, 1999) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Relief Supplementary to Judgment (Dockets No. 71, filed November 19, 1999) is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion to Strike documents in response to Defendants' unfiled Motion for Sanctions (Docket No. 89, filed January 18, 2000) is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion for Suggestion of Mootness and Motion to Vacate the Judgment and Motion to Dismiss Plaintiff's Claims with Prejudice (Docket Nos. 92-1 and 92-2, filed February, 2000) is GRANTED

pending the Sixth Circuit's order remanding the matter for entry of an order setting aside the Judgment and an order of dismissal of the case. The Court CERTIFIES to the Sixth Circuit Court of Appeals that this Court is of the opinion that an order setting aside the Judgment and an order of dismissal should issue and requests a remand of the matter if the Sixth Circuit so deems appropriate.

_"s/_____
DENISE PAGE HOOD
United States District Judge

Dated: September 28, 2001

Appendix E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Grace E. Tindall,

Case No.: 90-026438

Plaintiff,

V

Michael E. Tindall,

Defendant.
_____/

ORDER TRANSFERING CASE TO MACOMB COUNTY

This matter having come before this Court on Defendant's Notice/Motion for Entry of Order Dissolving Receivership and to Set Aside Order for Medical Expense Reimbursement and Sanctions Dated October 18, 1999, Defendant's Motion to Reverse Unauthorized Adjustment to Child Support Account and to Enforce Order Crediting Child Support Account dated October 18, 1999; Defendant's Verified Motion to Disqualify Wayne County Circuit Court Bench on Due Process Grounds and to Reassign Matter under MCR 3.212 dated November 9, 1999; and Receiver's Petition for Payment of Interim Fiduciary and Attorney Fees and

For Entry of Amended Order Appointing Receiver dated December 1, 1999, and, Plaintiff having appeared *in pro per,* and the office the Friend of the Court having been represented by Mr. Alan E. Skrok,

This Court having conducted a hearing on December 10, 1999, and it appearing to this court that in Michael E. Tindall vs. Wayne County Friend of the Court, By Joseph A. Schewe, Director of Legal Services, and Alan E. Skrok, Staff Attorney and Assistant Friend of the Court; Wayne County Sheriff's Department, By Robert Ficano, Sheriff: [and] Wayne County Circuit Court, Family Division, by Kirsten Frank Kelly, Presiding Judge and Michael F. Sapala, Chief Judge, J/S Case No 98-CV-73896-DT 9, pending in the Federal District Court for the Eastern District of Michigan (hereinafter "Tindall v. FOC") an opinion has been rendered in favor of the Defendant herein determining that the "Friend of the Court's practice to issue show cause orders and bench warrants without actual review by a judge and Defendant's [apparently all defendants, including this court] failure to follow the procedures set forth in MCR 3.208(B) and MCL 552.631 violate Plaintiff's due process rights" and a Judgment was entered thereon against Defendants in Tindall v. FOC, (including, apparently, this court).

It appearing to this Court that there is now an issue of the mere appearance of impartiality which

may tend to erode the public's confidence in the integrity of the judiciary based on the adverse ruling in Tindall v. FOC, indicates that this court should transfer this case to another county (See Michigan Code of Judicial Conduct, Cannon 2 A and B (discussing the importance of the public's confidence in the impartiality and integrity of the judiciary)), and

Defendant having submitted an order for entry pursuant to MCR 2,602(B)(3) and no written objections to the proposed order having been filed, and this court, sua sponte, having determined that changes to Defendant's proposed order are necessary to comport with this court's decision as well as to conform to the practices of the State Court Administrator's Office, and

After having conferred with members of the State Court Administrator's Office, and on January 13, 2000, this court having spoken with Judge Donald Martin of the Macomb County Circuit Court Family Division concerning the intention of this court to transfer this matter to Macomb County Circuit Court and this court being otherwise fully advised in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Notice/Motion for Entry of Order Dissolving Receivership and to Set Aside Order for Medical Expense

Reimbursement and Sanctions Dated October 18, 1999, Defendant's Motion to Reverse Unauthorized Adjustment to Child Support Account and to Enforce Order Crediting Child Support Account dated October 18, 1999; and Receiver's Petition for Payment of Interim Fiduciary and Attorney Fees and For Entry of Amended Order Appointing Receiver dated December 1, 1999, be, and they are hereby adjourned to be heard following reassignment of this case.

2. Defendant's Verified Motion to Disqualify Wayne County Circuit Court Bench on Due Process Grounds and to Reassign Matter to St. Clair County under MCR 3.212 dated November 9, 1999, is denied because the conditions under subrule (B) of MCR 3.212 are not satisfied.

3. This matter is hereby transferred to Macomb County Circuit Court in accord with MCR 2.212(A)(1)and (B)(2).

4. Defendant, Michael E. Tindall, shall pay any past-due fees and costs to the Wayne County Friend of the Court at the time of transfer pursuant to MCR 2.21 2©(2).

5. Defendant, Michael E. Tindall, shall pay any

and all costs incurred as a result of the transfer pursuant to MCR 2.212©(3).

6. Defendant shall continue to remit child support payments to the Wayne County Friend of the Court until this case is transferred to and established in Macomb County.

Dated January 14, 2000

__"s_____
J. W. CALLAHAN

TRUE COPY

Appendix F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Grace E. Tindall

Case No.: 90-026438 DM

Plaintiff,

v.

Michael E. Tindall,

Defendant.

_____/

ORDER TRANSFERING CASE TO MACOMB COUNTY

This matter is now before the Chief Judge of this Circuit Court upon its return from Macomb County Circuit Court, to which the matter had been transferred. The factual background is as follows:

Defendant previously petitioned the Trial Court (per the Honorable John William Callahan) to transfer this action to St. Clair County under MCR 3.212 citing "due process grounds." By Order of January 14, 2000, the Trial Court denied

that motion, finding that these grounds did not satisfy the conditions for transfer stated in MCR 3.212(B)(1). Nevertheless, the Trial Court found that there was an appearance of impropriety and partiality that might tend to erode the public's confidence in the integrity of the judiciary based upon the adverse ruling in Tindall v FOC. Accordingly, the Trial Court concluded that the matter should be transferred to another court. The Trial Court conferred with members of the State Court Administrator's Office and, pursuant to that conference, ordered the matter transferred to Macomb County Circuit Court in accord with MCR 3.212(A)(1) and (B)(2). The Trial Court also directed defendant to pay any and all costs incurred as a result of the transfer pursuant to MCR 3.212(C)(3). Defendant failed and refused to pay those costs, despite having requested the transfer. Accordingly, the Macomb County Circuit Court issued an Order of Dismissal on March 17, 2000, and returned this matter to this Court.

The Court's concerns regarding the appearance of impropriety and partiality still being an issue of paramount importance, IT IS HEREBY ORDERED THAT

1. This Matter is hereby transferred to Macomb County Circuit Court in accord with MCR 3.212(A)(1) and (B)(2) and pursuant to the Court's conference with the State Court Administrator's Office.

2.Pursuant to MCR 3.212(D), no statutory filing fee shall be assessed as this Court has initiated the transfer.

Dated March 28, 2000.

_"s_____
HON. MICHAEL F. SAPALA
Chief Judge, Third Judicial Circuit Court

A TRUE COPY